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Supreme Court, U.S.
FILED

No. **051063** FEB 15 2006

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In The
Supreme Court of the United States

ALICE LARAINÉ DIMERY,

Petitioner,

v.

ULSTER SAVINGS BANK,

Respondent.

On Petition For A Writ Of Certiorari
To The Court Of Appeals, State Of New York

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Fourteenth Amendment to the Constitution permits a judicial determination of "incompetence" relative to a state chartered, federally regulated banking corporation.
2. Whether the Fourteenth Amendment to the Constitution, in the absence of a determination of fraud, permits the due process and equal protection rights of the aggrieved to be waived on the grounds of the judicial determination of "incompetence" of the corporate person: lack of legal qualifications and fitness to carry out required duties.

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PETITION FOR A WRIT OF CERTIORARI

A.L. Dimery respectfully petitions for a writ of certiorari to review the Opinion of the New York State Court of Appeals in this case.

OPINIONS BELOW

Decision & Order of the Supreme Court of the State of New York Appellate Division Second Judicial Department filed December 27, 2004 is reported at 13 A.D.3d 574 and 789 N.Y.S.2d 159 and set forth in the Appendix hereto (App. 3).

Judgment of the Supreme Court of the State of New York County of Putnam dated and decided October 26, 2000, unpublished, is set forth in the Appendix hereto (App. 9).

Decision & Order of the Supreme Court of the State of New York County of Putnam dated and decided May 19, 2000, unpublished, is set forth in the Appendix hereto (App. 56).

BASIS FOR JURISDICTION

The New York State Court of Appeals denied a Motion to Reargue Motion For Leave to Appeal on November 17, 2005 (App. 1). This petition for a writ of certiorari is filed within ninety days from the entry of the Opinion. Sup. Ct. R.13.1. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution Amendment XIV:

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of

life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

The judgment rendered in this case by Decision and Order, a "judicial determination of incompetence" relative to Ulster Savings Bank, a federally regulated New York State chartered banking corporation is unprecedented. As self reported by the Respondent bank, "Ulster Savings Bank is a banking corporation organized and existing under the laws of the State of New York as a mutual savings bank. Ulster Savings Bank has three subsidiaries, which are Ryan Insurance, USB Agency, Inc. and Ulster Home Mortgage, Inc."

Proceedings in the State Courts

This case evidences a lack of jurisdiction, an excess of jurisdiction on the face of the record and the proceedings are erroneous on the face of the record, and there is no other adequate remedy at law.

Modified by the Appellate Division Second Department, the resultant affirmed Judgment and underlying Decision and Order hold that the Respondent Ulster Savings Bank, a federally regulated banking institution, (1) did violate statutes, laws, rules, and regulations, (2) did in fact practice fraud on the court, (3) did submit false affidavits, [labeled "affidavit[s] in a different time frame" by the trial court (App. 78), (4) did claim title to real property under referee deeds of dubious origin, (5) did fail to enter the joint venture agreement between the parties into its corporate records, (6) did fail to carry joint venture revenue receipts on its books, (7) did divest joint venture assets during litigation, (8) did claim ownership of real property of the Petitioner mortgaged to and not mortgaged to the bank under both, out of venue foreclosure proceedings and totally fabricated foreclosure representations to regulators, examiners and tenants of the Petitioner, (App. 100, 102, 99) while debiting and retaining mortgage

principal and interest under agreement between the parties (App. 89), and (9) did cause "the many other errors and omissions disclosed during the trial," (App. 83) raising jurisdictional questions for failures to comply with statutory requirements.

The bank did submit in this case a 1989 HUD settlement statement falsely identifying the city location of the property sale [Carmel, NY 10512 vs. Mahopac, NY 10541] (App. 119), and did identify itself, as seller of the property, having an address in Carmel, NY 10512 [a location without relevance to the parties' joint venture or to bank branches of record], and did differently identify itself as the lender in the transaction as located in Kingston, NY. Trial exhibits [R. 1895, 1896, 3384, 3506] further established that the relevant deed filed in the Putnam County Clerk's Office identifies the bank as seller under its Kingston, NY address, a different assertion from that in the HUD statement. Other trial exhibits [R. 2525], filed in Putnam County Offices, confirm a previous sale of the same property to the same buyer for the same price as reported in the HUD statement but on an earlier date under a referee deed of dubious origin different from the deed filed in the Putnam County Clerk's Office referencing the Petitioner's subdivision plat, filed map #2252B. (App. 107, 108, 110, 111)

The R.¹ at page 3993, trial exhibit 43, is the 1982 HUD settlement statement relative to Dimery's original mortgages on the geographically related subdivision parcels which were vacant land in 1982. This 1982 HUD statement identifies the property as being located in Mahopac, NY 10541, not Carmel, NY 10512 as reported to HUD in 1989 by Ulster Savings Bank. Trial documents from the files of the Respondent bank further state that this property was sold previously by the bank in February of 1986, within weeks of it claiming ownership by surreptitiously filing a referee deed of unknown origin, and the March 1, 1985 collateral deed from the Petitioner, and that application for a mortgage in conjunction

¹ This reference is to the reproduced Record on Appeal.

with the sale was made by Ulster. The "tenants" of record were those of the Petitioner. (App. 100, See App. 94) The joint venture accounting credited only one \$230,000.00 transaction pursuant to instructions from the trial court. (App. 62) Bank tax records report that this same purchaser also bought Petitioner's residence in 1989 from Ulster. (See App. 78) A case document obtained from the files of the bank additionally reports that in February of 1986, Petitioner's residence was also sold and that the bank sought a mortgage for the transaction. The document reports that the residence was *vacant* at the time of the sale in 1986, while the bank serviced the Petitioner's residential mortgage (See App. 92, See App. 89, 90, 104) and reported to the FDIC and the New York State Banking Department that the property was an ORE in the bank's possession, having been foreclosed. (See App. 97) The bank's general ledger reports a \$106,000.00 deferred profit on the above discussed \$230,000.00 sale as an ORE in 1989. (App. 96, 97, 98)

In Plaintiff's Reply Brief under section entitled "The Documentary Evidence Reports Multiple Sales" pages 33-34, the HUD issue was raised before the Supreme Court.

This is not a case where the plaintiff has asked the Court to re-write any agreement with the defendant. Rather, the plaintiff seeks to have the agreement with the defendant, as claimed by her and as demonstrated by the weight of the evidence, validated and her rights thereunder upheld. [Ibid. 38] (See App. 72)

What the bank did, during the dealings of the parties is clear on the face of the record, and acknowledged and understood by the trial court in statements from the bench, by Decision, and Order and final Judgment, and are covered in specific relevant detail below.

The Court: The venture was an item on the side of someplace, however you want to categorize it, but it was not reflected in the normal course in the bank's records, and I think that is not

disputed, I think that has been testified to and is not in dispute [R. 886 line 20]

Correspondence (App. 87) [Exhibit K Affirmation of Order to Show Cause January 4, 2000 Appellate Division] from the Chairman and CEO of Ulster Savings Bank, Howard C. St. John, dated June 5, 1989, to the Petitioner, seeking to reduce the Petitioner's joint venture "profit from 33 $\frac{1}{3}$ % to 25%", "based on extention [sic] of your contract with Ulster Savings dated March 1, 1985", stated the following:

I would respectfully urge you and request that you obtain services of an independent attorney to review the agreement to see that you [sic] rights are fully protected. Throughout these negotiations I have acted solely on behalf of Ulster Savings Bank and as Chairman of that Bank, I have no duty and or obligation to protect your interests, since they are necessarily adversarial to the Bank. [Affirmation in Support of Order to Show Cause, pg.17, January 4, 2001 Appellate Division Second Department]

"... In that fiduciary or confidential relationship, [defendant bank] did not act towards the plaintiff with any loyalty." "The preference to self is made subordinate to loyalty to others." *Meinhard v. Salman*, 45 N.Y.2d 233 (1978) [Plaintiff's Post-trial Memorandum, page 48, February 28, 2000]

Before the trial court was an April 25, 1991 cover letter (App. 89) to the Petitioner from chairman Howard St. John accompanying an accounting statement identified by him as having been prepared by the mortgage department of Ulster Savings Bank. St. John claimed ownership for Ulster of the Petitioner's mortgaged to Ulster and non-mortgaged to Ulster real property, stating that the bank's rights stemmed from unidentified foreclosure actions. The March 1, 1985 Agreement, held by the trial court as having established the parties' joint venture, was not referenced in the letter. The accounting was a detailed statement of the complete liquidation of the Petitioner's mortgage obligations to the bank, determined by the trial court as being extant on March 1,

1985 when the Agreement was signed. (App. 57) The sum reported in the accounting statement as having been debited and retained by Ulster, liquidating the mortgages, was \$636,745.05, principal and interest, on residential property \$358,224.48 and \$278,520.57 on the two vacant subdivision parcels part of the joint venture subdivision property. [R. 2904] Ulster Savings Bank in its Memorandum of Law, dated December 29, 2000, in Opposition to Plaintiff's Motion to Stay Enforcement of Judgment, "explained" to the Appellate Division Second Department that the Petitioner "has lived parasitically off Ulster." "The accounting clearly shows that the Respondent acknowledged debiting over \$636,000.00, thus liquidating the mortgage indebtedness allegedly due from Appellant from the activities on the real property in question." [Affirmation in support of Order to Show Cause, pg.15 October 15, 2000 Appellate Division Second Department]

The chairman's letter to Petitioner, adjudged the bank's joint venture partner, concluded:

All of the foregoing information is provided you [sic] without any acknowledgement of any legal rights to this information, or to any other aspect of these transactions. This information is provided to you solely as a matter of courtesy, without any legal implications flowing there from.

By Decision and Order the trial court held

... the bank was extremely liberal in the manner in which it treated Dimery as compared to any other mortgagor. It was highly unusual for a bank to enter a joint venture with a debtor ... Under these circumstances to seek and ask for punitive damages is like biting the hand that feeds you. (App. 85)

In Plaintiff's February 25, 2000 Post-trial Memorandum at page 15, counsel argued that in the Agreement as written,

"there was no obligation on the part of the defendant [bank] which could be measured against any countervailing duty upon the defendant by